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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>HEATHER ANNE HOWELL,<br>Defendant and Appellant. | A144164<br><br>(Sonoma County<br>Super. Ct. No. SCR 619648) |

While driving under the influence (DUI), defendant Heather Anne Howell caused a fatal vehicle collision. At a first trial, defendant was convicted of reckless driving and vehicular manslaughter, but the jury hung on a murder count. At a second trial, defendant was convicted of second degree murder. Defendant argues her second degree murder conviction should be reversed because (1) the jury at the second trial was not instructed on the results of the first; (2) the trial court erred in admitting hearsay evidence; (3) the prosecution was permitted to introduce irrelevant evidence concerning a DUI course defendant attended in 2006; and (4) there was insufficient evidence to establish defendant harbored the requisite mens rea. We affirm.

## I. BACKGROUND

Defendant was charged by information with murder (Pen. Code, § 187, subd. (a)), reckless driving (Veh. Code, § 23104, subd. (b)), and vehicular manslaughter (Pen. Code, § 191.5, subd. (a)). On September 11, 2013, a jury found defendant guilty of reckless driving and vehicular manslaughter, but deadlocked on the murder charge. After a

second trial, a jury found defendant guilty of second degree murder. Defendant was sentenced to 15 years to life.

The charges arose out of a vehicle collision on Hall Road in Santa Rosa on July 14, 2012 at about 4:00 p.m. Several hours before the incident, defendant and her ex-boyfriend, Charles "Tony" Kraus, visited defendant's ill mother in the hospital. Defendant and Kraus left the hospital and played horseshoes at a bar. While at the bar, defendant had a cranberry juice and vodka drink. Kraus later told police defendant had a "few beers." Defendant and Kraus then returned to defendant's home and argued about one of Kraus's ex-girlfriends. Kraus told police defendant was angry because she discovered he had been unfaithful to her.

Kraus abruptly walked away from the argument and drove off on his motorcycle. Defendant followed in her black Acura coupe. Defendant's intent is in dispute. Kraus told police he was afraid defendant was trying to "run him down." Defendant asserted she followed Kraus because she initially believed he was returning to the hospital.[1] She also told police that when Kraus turned away from the hospital, her intent was "no further than to say, 'What the hell are you doing?' "

Several people witnessed the chase. Jennifer Arnold, who was driving north on Fulton Road, testified she saw a black car driving south cross into the northbound lane. As Arnold slammed on her brakes, she saw a motorcycle in front of the black car. Manda Mello, who was also heading north on Fulton Road, testified she saw a car following a motorcycle at about 60 to 70 miles per hour, and the two vehicles passed another car on the right shoulder. According to Mello, the woman driving the car had the "majority of her upper body out the window, long blond hair flowing, pointing a finger and chasing behind a motorcycle." Other witnesses also saw defendant and Kraus weave in and out of traffic, pass on the right, and speed through red lights on Fulton Road. One witness

[1] Before talking with the police, defendant was read her *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.)

said defendant was laughing, with her head thrown back, another heard her cry "yee haw."

Defendant and Krauss turned right onto Hall Road, and then apparently took another right into the Countryside Estates development. They subsequently exited the development the same way they came in and turned back onto Hall Road. Susan Parry testified that, as Kraus made a right to get back on Hall Road, defendant came around and cut him off, forcing Kraus to stop. The vehicles accelerated again and continued west on Hall Road.

A few moments earlier, Robert Tuttle[2] was driving his Lexus south on Fulton Road and was passed by defendant and Kraus. Tuttle saw them turn right on Hall Road. Tuttle also turned right, and he continued on Hall Road at about 50 miles per hour, the posted speed limit, as defendant and Kraus took their detour through Countryside Estates. Sometime after defendant and Kraus returned to Hall Road, Tuttle heard a rumble behind his car. Shortly thereafter, Tuttle's vehicle was hit just behind the right front wheel and fender. Tuttle testified he stopped, and defendant's Acura passed him and parked down the road. Then, according to Tuttle, another car—a Triumph—passed, swerved several times, flipped over, and caught fire.[3] The driver of the Triumph, Jesse Rodriguez Garcia, died from the effects of the fire.

California Highway Patrol accident investigator Christopher Linehan examined the scene and the physical evidence and reviewed witness statements. Linehan testified as follows: Kraus's motorcycle passed Tuttle's Lexus on the left as the two vehicles were driving west on Hall Road. Defendant then drove her Acura onto the shoulder of Hall Road and tried to pass Tuttle on the right. There was matching "sideswipe" damage to the Lexus and Acura, indicating the left side of the Acura made contact with the right

[2] Tuttle's exact age is unclear from the record, but he testified he had lived in Sonoma County for 91 years.

[3] It is not entirely clear from Tuttle's testimony from where the Triumph had come. Tuttle had stated he saw no traffic ahead of him on Hall Road. Mary Stuart, a passenger in Tuttle's Lexus, testified the Triumph was coming from the west.

side of the Lexus. As the Acura came back onto the roadway, it rear-ended Garcia's Triumph, causing the Triumph to lose control and overturn.

Christina Gossner, who was passing by shortly after the collision, asked defendant if she was injured. Defendant replied: "I don't know. I don't know. My mom is in the hospital and I just clipped him and he rolled."

Defendant told patrol officer Kristen Franks she had been speeding while traveling west on Hall Road, the vehicle in front of her was making a right turn into a driveway, she had crossed the double yellow lines to pass the car on the left, and she then collided with another vehicle that was traveling east.

Officer Eric Clary, who also talked with defendant, noticed her demeanor fluctuated between excited and lethargic, and she slurred her speech. Clary smelled alcohol and asked defendant if she had consumed any. Defendant said she had a vodka and cranberry juice about 9:00 a.m. She also said she had a medical marijuana license, but had not consumed any drugs that day.

Defendant's blood was drawn, and an analysis of the sample revealed a blood alcohol content (BAC) of 0.11 percent. The analysis also indicated daily use of marijuana and showed defendant had used cocaine within the previous eight hours, although the effects of cocaine only last about 30 minutes.

## II. DISCUSSION

### A. *Instructional Error*

At the first trial, defendant was convicted of reckless driving and vehicular manslaughter, but the jury hung on the murder charge. At the second trial, the trial court instructed the jury: "[T]he defendant . . . was previously convicted in this case by another jury of two felonies based on the same evidence as was presented to you. However, the jury was unable to reach a unanimous decision on the charge of murder as defined herein. As a result, the defendant is being retried on that charge alone." Over defendant's objection, the trial court refused to specify what defendant's other felony convictions were. The court explained: "[T]elling [the jury] what the charges are would tend to confuse them." Defendant now argues the trial court erred in failing to specify

she was previously convicted of reckless driving and vehicular manslaughter. We disagree.

Defendant primarily relies on *People v. Batchelor* (2014) 229 Cal.App.4th 1102 (*Batchelor*). In the first trial in that case, the jury found the defendant guilty of gross vehicular manslaughter while intoxicated, but it was unable to reach a verdict on a murder charge. (*Id.* at pp. 1107–1108.) At a second trial on the murder charge, defense counsel requested the jury be informed of defendant's conviction in the first trial. (*Id.* at p. 1115.) The trial court refused to give the requested instruction, and the Fourth Appellate District reversed. (*Id.* at pp. 1115–1118.) The court explained: "The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished." (*Id.* at pp. 1116–1117.) The court's decision was premised in part on the prosecutor's closing argument that the jury should hold the defendant " 'accountable.' " (*Id.* at p. 1117.) Specifically, the prosecutor argued: " 'There is only one count in this case that you have to decide on. This is it. Hold him accountable for killing someone.' " (*Ibid.*) The court explained this argument contributed to the misleading impression that, absent a conviction on the murder charge, the defendant would not be held at all accountable for the victim's death. (*Ibid.*)

*Batchelor* is distinguishable. As an initial matter, the prosecutor in the instant action did not argue defendant needed to be held accountable or otherwise suggest defendant would go unpunished in the event of an acquittal. Nor did the trial court's instructions create a false impression defendant would go unpunished absent a guilty verdict on the murder charge. To the contrary, the court instructed the jury that defendant had already been convicted of two felonies based on the same evidence. Defendant argues the term felony was never defined for the jury, and thus the jurors could have believed defendant's other convictions were for minor offenses "worthy only of a sentence to county jail." But even if the trial court had informed the jury that defendant had been convicted of reckless driving and vehicular manslaughter, the jurors could have

only speculated as to the elements of and possible sentences for those offenses. To the extent defendant is contending the trial court should have also provided the jury with a description of the sentencing possibilities, her argument runs counter to the standard rule that, during the guilt phase of a trial, punishment is not an appropriate consideration for the jury. (See *People v. Martinez* (2010) 47 Cal.4th 911, 958.)

Accordingly, we conclude the trial court need not have informed the jury of the specific charges on which defendant was convicted in the prior trial.[4]

**B. *Hearsay***

Defendant further argues the trial court erred in allowing the prosecution to introduce out-of-court statements Kraus made to Officer James Clevenger after the accident. We find any error was harmless.

Defendant's hearsay arguments specifically relate to the testimony of Officer Linehan, the prosecution's expert collision investigator. Linehan's direct testimony focused on his reconstruction of the collision. On cross-examination, defense counsel asked Linehan about the position of the victim's Triumph in the moments before it was rear-ended by defendant's Acura. Defense counsel questioned if it was possible the Triumph crossed into the eastbound lane to pass Tuttle's Lexus on the left, essentially suggesting the Triumph was speeding. Linehan stated it was possible, but Kraus's statement that he had approached the rear of the Lexus, not the rear of the Triumph, suggested otherwise. Defense counsel then attacked Linehan's reliance on Kraus's statements, suggesting Kraus had reason to lie because he was concerned his reckless driving contributed to the collision. Linehan responded he believed Kraus was in fear for his life because defendant was chasing him. Upon further questioning, Linehan conceded there was no physical evidence indicating defendant drove her Acura at Kraus's motorcycle, only Kraus's statement concerning the incident. Defense counsel tried to

[4] Defendant argues that, to the extent her trial counsel failed to properly object to the jury instruction concerning the prior trial, we should reverse based on ineffective assistance of counsel. As we find the instruction was proper, we do not need to reach the issue.

indirectly impeach Kraus in other ways. Linehan admitted it would affect his reliance on Kraus's statement if Kraus lied about defendant's father being dead. Counsel also suggested Kraus lied when he told police defendant had learned about his infidelity immediately before the chase.

Before her redirect, the prosecutor advised the court "the door has been opened as to Mr. Krauss' statement," and argued she should be permitted to get into the actual statement. Defense counsel did not object, but asked the court to give a limiting instruction. The court agreed to do so.[5] On redirect, Linehan read the following portion of Clevenger's report into the record: "[Kraus is] involved in a relationship with the driver of the black Acura. Heather Howell. He said she has been going through an emotional roller coaster with her father that had passed away and now her mother is in the hospital. [¶] Krauss said Howell had a few beers earlier during the day and found out that he had been cheating on her with his ex. [¶] He believed the combination of her emotional state of mind, the alcohol, and the fact that she had caught him cheating must have set her off. [¶] Krauss would not tell me where he was coming from, but he related that he was headed southbound on Fulton Road, north of Hall Road, attempting to get away from Howell. [¶] He said he was afraid that she was going . . . to run him down, so he had no choice but to speed. [¶] He admitted cutting through traffic at a high rate of speed, but only to get away from Howell. [¶] He said he turned right, which is west, onto Hall Road and continued to flee in hopes of losing Howell."

Defendant now argues the only relevance of Kraus's statement was that he conceded he passed Tuttle's Lexus on the left, and there was no basis for introducing the prosecutor to admit Kraus's irrelevant hearsay statements on the theory defense counsel "opened the door" on cross-examination. Defendant contends that, while it may have been proper for the prosecutor to further explore the reasonableness of Linehan's decision

[5] Defendant argues the court erred because it never gave the limiting instruction. However, the court did at one point inform the jurors the expert could rely on hearsay, but they could not. In any event, as discussed below, we find any error in admitting Kraus's hearsay statements was harmless because they contained no new information.

to credit Kraus's statement on redirect, "it was not proper to admit those portions of Krauss's statement that were not relevant to Linehan's opinion as to the mechanics of how the accident happened." According to defendant, the only possible basis for admitting additional portions of Kraus's account would be Evidence Code section 356, which provides that when a part of a writing is given in evidence by one party, "the whole on the same subject may be inquired into by an adverse party." Defendant argues section 356 only allows the admission of those parts of a document that are necessary to make the portions admitted understood, and it is error to admit those portions of a document that are on a different subject.[6]

We need not and therefore do not decide whether the out-of-court statements introduced on redirect were inadmissible, as we find any error was harmless. There was no possibility the introduction of this evidence affected the outcome of the trial. Almost all of Kraus's out-of-court statements to Clevenger had already been introduced by *defendant.* In response to defense counsel's questions on cross-examination, Linehan testified about Kraus's statement that defendant was trying to run him over. Moreover, in attempting to attack Linehan's reliance on Kraus, defense counsel also suggested Kraus had lied when he stated defendant's father was dead and defendant had learned of his infidelity immediately before the accident. Linehan's recitation of Clevenger's report on redirect was merely a repetition of these statements. And the portion of Clevenger's report regarding the mechanics of the accident was repetitive of various other evidence introduced throughout trial.

The only new hearsay evidence introduced during the prosecution's redirect of Linehan was Kraus's statement defendant had consumed several beers earlier in the day. Defendant argues this evidence tended to prove she had consumed so much alcohol she

[6] Defendant argues that, to the extent she waived these arguments by failing to properly object below, we should reverse based on ineffective assistance of counsel. As discussed below, we find any error in admitting Kraus's hearsay statements was harmless. Thus, even if there was ineffective assistance counsel, reversal would not be warranted.

must have known she was intoxicated. She also contends it contradicted her statement to police that she consumed only a cranberry juice and vodka drink earlier in the day. But the prosecution did not need Kraus's statement about the beers to prove defendant was aware of her intoxicated state. Blood drawn from defendant at the scene by a paramedic indicated she had a BAC of 0.11 percent, well over the legal limit, and Officer Clary noticed defendant was slurring her speech after the accident. In light of this evidence, defendant's assertion she had a single drink at 9:00 a.m., almost seven hours prior to collision, was not believable. And to the extent defendant is arguing she was sober at the time of the collision, the jury had even more reason to find her mental state was consistent with that required for second degree murder.

**C. *DUI Course***

In 2006, several years before the collision at issue here, defendant pled guilty to DUI. As a result of her plea, she was required to attend a DUI education course. Over the objection of defendant, the prosecution introduced exhibit 45, a guidebook for the course that was created in 2008. Defendant argues the guidebook is inadmissible and prejudicial because it was created after she took the DUI course and because the prosecutor used it to show defendant was well aware of the risks of drinking and driving. However, the prosecution laid an adequate foundation for the guidebook by introducing testimony from a Sonoma County drug and alcohol counselor, who stated the exhibit reflected the program requirements in existence when defendant took the DUI course in 2006. Accordingly, the guidebook was relevant to show defendant had been made aware of the risks of drinking and driving. While defendant was free to argue the guidebook should be accorded little weight, she cannot credibly argue it should have been excluded altogether.[7]

[7] Defendant also asserts trial counsel failed to properly object to the use of exhibit 45, and trial counsel should have objected to its introduction on the additional ground the exhibit is inadmissible under Evidence Code section 352. Based on these alleged omissions, defendant argues we should reverse for ineffective assistance of counsel. We conclude there were no grounds, either raised or not, to exclude exhibit 45 and we therefore do not reach the issue of ineffective assistance of counsel.

**D. *Substantial Evidence***

Defendant asserts her conviction for second degree murder is not supported by the evidence. We cannot agree.

We must affirm the jury's verdict if it is supported by substantial evidence. On substantial evidence review, we " 'view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court.' " (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) "We may not substitute our view of the correct findings for those of the [jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [jury]'s decision." (*Ibid*.) "Substantial evidence, of course, is not synonymous with 'any' evidence." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.) Rather, it is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) The focus is on the quality, not the quantity, of the evidence. (*Ibid.*)

Here, defendant argues there was insufficient evidence to establish she had the requisite mens rea for second degree murder. "Murder is the unlawful killing of a human being . . . with malice aforethought." (Pen. Code, § 187, subd. (a).) "[M]alice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." (*People v. Watson* (1981) 30 Cal.3d 290, 300.) "One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others." (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897.) The following factors have been relied upon in upholding drunk-driving-murder convictions: "(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.)

In this case, substantial evidence supported a finding of implied malice. Defendant had a BAC of 0.11 percent, and she admitted to drinking before the collision. Defendant previously pled guilty to a DUI, the trial judge in that case had warned her of the consequences of such conduct, and defendant took a DUI education course. Further, defendant engaged in highly dangerous driving. Witnesses testified defendant drove at high speeds, wove in and out of traffic, ran multiple red lights, and passed other vehicles on the right using the shoulder and the bike lane, while at times hanging out of her car window. As defendant exited Countryside Estates, she cut off Kraus and came to a stop. Rather than end the dangerous chase there, defendant decided to continue to chase Kraus down Hall Road. The specifics of the fatal collision on Hall Road are in dispute. But based on the evidence presented at trial, the jury could have reasonably concluded defendant, Tuttle, and the victim were all driving west; defendant tried to pass Tuttle on the right shoulder as the victim was passing on the left; and defendant rear-ended the victim as they both attempted to return to the westbound traffic lane.

Defendant argues passing on the right may have been illegal, but it was not inherently dangerous to human life. While defendant concedes it is possible the victim passed Tuttle on the left at the same time she was passing on the right, she submits a fatal collision was not foreseeable. But it was reasonable for the jury to infer the victim did not, as defendant appears to suggest, appear out of nowhere. It was also reasonable for the jury to infer defendant chose to drive on the shoulder because she wanted to pass Tuttle and the victim at the same time, and she appreciated the risk to all involved when she did so. Defendant further argues there was no reason to believe she was traveling significantly faster than the speed limit at the time of the collision. Not so. After the accident, defendant admitted to a police officer she had been speeding. Even if defendant was not speeding, it was reasonable to conclude passing Tuttle on the right while the victim passed on the left was inherently dangerous. Finally, defendant argues there is no evidence she was aware she was intoxicated to the point where her driving posed a serious risk to human life. In light of defendant's prior DUI, BAC, and her highly dangerous driving before the collision, the jury could have reasonably found otherwise.

## III. DISPOSITION

The judgment is affirmed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.

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